

The Honorable MARSHA J. PECHMAN

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON FOR SEATTLE

ANYSA NGETHPHARAT and JAMES
KELLEY;

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY;

Defendant.

NO. 2:20-cv-00454 MJP

JOINT RULE 26(f) STATUS REPORT
AND DISCOVERY PLAN

In accordance with FRCP 26(f) and LCR 26(f), Plaintiffs Anysa Ngethpharat and James Kelley (“Plaintiffs”) and Defendant State Farm Mutual Automobile Insurance Co. (“Defendant”) (collectively, “Parties”), jointly submit their Joint Rule 26(f) Status Report and Discovery Plan.

1. A statement of the nature and complexity of the case.

Plaintiffs’ Statement:

This is an insurance claims practice dispute involving Plaintiffs’ challenge to State Farm taking a common “adjustment” (which is always a deduction) for “Typical Negotiation Adjustment” on total loss valuations obtained from a third party vender Audatex, valuations then sent to insureds, when settling first party (collision, comprehensive, and underinsured motorist

property damage) personal line total loss claims. Plaintiffs contend that this adjustment is not allowed by WAC § 284-30-391(4) which requires that in settling total losses:

the insurer must... (b) Base all offers on itemized and verifiable dollar amounts for vehicles that are currently available, or were available within ninety days of the date of loss, using appropriate deductions or additions for options, mileage or condition when determining comparability.

Nor is it allowed by WAC § 284-30-391(5) which expressly states that beyond the adjustments allowed by §§(4): “Insurers may adjust a total loss settlement through the following methods only: [listing unrepaired damage and salvage value]”, or §391(2)(b)(iii), §391(2)(b)(iv)(B), §391(2)(b)(v), & §391(4)(b) which require the valuation to be based upon the actual verifiable prices of vehicles available within 90 days of the loss within 150 miles of the total loss vehicle’s location, be based upon “comparable motor vehicles” i.e. same make model and year, be based upon reasonable and accurate data, and be calculated in a valid manner.

Because the additional adjustment/deduction taken by State Farm is (a) not “verifiable” by the insured (or anyone, including State Farm), (b) is not based upon *actual* prices on vehicles currently available or which were available within 90 days, (c) is not based upon actual vehicles available within 150 miles of the total loss vehicle, (d) is not based upon “comparable motor vehicles”, (e) is not based upon one of the permitted adjustments for “options, mileage, or condition”, and (f) is not based upon a reasonable methodology using reliable data, Plaintiffs alleges that it’s use by State Farm in settling claims is a breach of contract as well as a violation of the Washington Consumer Protection Act. Plaintiffs seeks certification of the following Class:

All STATE FARM insureds with Washington first party personal line policies issued in Washington State, who received compensation for the total loss of their own vehicles under their First Party (Comprehensive, Collision, and UIM) coverages, and who received a total loss valuation from Audatex based upon the

1 value of comparable vehicles which took a deduction/adjustment for “typical
2 negotiation.”

3 Excluded from the Class are (a) the assigned judge, the judge's staff and family, and STATE
4 FARM employees, (b) claims for accidents with dates of loss occurring more than six years
5 before the date of filing, (c) claims where the total loss was on a “non-owed” vehicle (where
6 no insured has any ownership interest or rights in the vehicle), and (d) claims where the
7 insured submitted written evidence supporting a different valuation, and the amount of that
different valuation submitted by the insured was paid by STATE FARM to settle the total
loss.

8 Dkt#5 at 5.3-5.4. Plaintiffs seek payment of the amount of the invalid “adjustment” which was
9 not paid along with trebled under the Consumer Protection Act and injunctive and declaratory
10 relief.

11 Defendant’s Statement:

12 This case challenges the actual cash value that the two named Plaintiffs were paid for
13 their vehicles after they were damaged in accidents to such an extent that State Farm declared
14 them total losses. Washington insurance regulations define the actual cash value of a vehicle as
15 the fair market value of the vehicle immediately before the accident.
16

17 Both of the State Farm policies at issue contain appraisal remedies that are specifically
18 permitted by Washington law. In fact, Plaintiff Ngethpharat, through her attorney, demanded an
19 appraisal under the policy and appointed an appraiser. She then switched lawyers, refused to
20 proceed with the appraisal she demanded, and now claims only to challenge the legality of a
21 “negotiation discount” that was not even applied to the actual cash value she was paid by State
22 Farm. Ms. Ngethpharat either is estopped to refuse the remedy she invoked or must submit to
23 appraisal because this dispute, at its core, is about the value of Ms. Ngethpharat’s vehicle.
24 Determining that value through appraisal now is necessary to assess whether Ms. Ngethpharat
25 even suffered injury and has standing to pursue her claims.
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1 Recognizing the fatal flaws in Ms. Ngethpharat's claim, Plaintiffs' counsel added Mr.
2 Kelley as a named Plaintiff in their Amended Complaint. Mr. Kelley also alleges that State Farm
3 underpaid him for his totaled vehicle. To avoid the appraisal remedy designed to promptly
4 resolve any disputes concerning the fair market value of an insured's vehicle, Plaintiff Kelley
5 argues that his allegations do not center on the disputed value of the damaged property. But that
6 can't be so. Mr. Kelley is unquestionably alleging that State Farm underpaid him for the value of
7 his vehicle, and he has now sued State Farm asserting that State Farm owes him more. As above,
8 an appraisal is necessary to assess whether Mr. Kelley was underpaid, and if not, he, like Ms.
9 Ngethpharat, lacks standing to pursue his claims.

12 If the appraisal remedy in the Plaintiffs' policies is not enforced, the Amended Complaint
13 should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). All of Plaintiffs' claims rest upon the
14 same faulty premise, namely, that the advertised price of a used car is equal to its fair market
15 value. That premise has neither law nor logic to support it. Nothing in the Washington insurance
16 regulations prohibits State Farm from applying a negotiation discount to account for the reality
17 of the used car purchase process. And in light of Plaintiffs' argument that they are not disputing
18 the value of their totaled vehicles, the allegations of the First Amended Complaint fail to state a
19 claim that Plaintiffs received less than the actual cash value of their vehicles as required by
20 Washington law.

23 Defendant also denies that any class can be certified under Fed. R. Civ. P. 23 for multiple
24 reasons, including that a class action is not superior to the prompt and inexpensive appraisal
25 remedy provided to any State Farm insured who disagrees with the actual cash value calculated
26 by State Farm.

1 **2. *Proposed deadline for joining additional parties.***

2 PLAINTIFFS: Plaintiffs contends that they should be permitted to join additional named
 3 class representatives, if necessary, through and including the Court's decision on class
 4 certification or for a reasonable time after class certification if the Court rules an additional
 5 representative is needed, and/or prior to trial to supplement representation. The Manual for
 6 Complex Litigation and the case law support Plaintiffs' contention that additional class
 7 representatives can be added, *as necessary*, even after a class certification ruling. Plaintiffs does
 8 not intend to add any new Defendant parties ..

9 Defendant's Position: Defendant disagrees with Plaintiffs' contention that they should be
 10 permitted to join additional named class representatives at any time "through and including the
 11 Court's decision on class certification or for a reasonable time after class certification if the
 12 Court rules an additional representative is needed, and/or prior to trial to supplement
 13 representation." Permitting Plaintiffs near-unlimited ability to add or substitute named plaintiffs
 14 throughout the discovery process and after the Court's class certification decision invites
 15 gamesmanship, and will result in delays, inefficiencies, and protracted discovery. Defendant
 16 must obtain discovery from each named representative, as the adequacy and typicality of each
 17 named representative is critical to the class certification inquiry. *See* Fed. R. Civ. P. 23.
 18 Accordingly, Defendant's position is that Plaintiffs' deadline to add a new class representative
 19 should be no later than 60 days following the Court's ruling on State Farm's Motion to Dismiss,
 20 Stay and Compel Appraisal. (ECF No. 18.)

21 **3. *Whether parties' consent to Magistrate Judge Mary Alice Theiler conducting all***
 22 ***proceedings including trial and the entry of judgment.***

23 No.

1 **4. Discovery Plan**

2 **(A) Initial disclosures.**

3 The parties will serve their initial disclosures by June 29, 2020.

4 **(B) Subjects, timing, and potential phasing of discovery.**

5 Plaintiffs' Position: Plaintiffs propose two phases for discovery: (Phase 1) discovery
6 relevant to Plaintiffs' individual claims and whether the requirements for class certification have
7 been met; and (Phase 2) if a class is certified, full discovery relevant to the merits of the class
8 claims, and or if no class is certified, full discovery as to the merits of Plaintiffs' individual
9 claim. See Manual for Complex Litigation (4th) § 21.14 ("Discovery relevant only to the merits
10 delays the certification decision and may ultimately be unnecessary. Courts often bifurcate
11 discovery between certification issues and those related to the merits of the allegations."). By
12 agreeing to bifurcated discovery in this manner, Defendant reserves all rights with respect to
13 class certification and Plaintiffs' burden to demonstrate that class certification is appropriate in
14 this case.

15 Phase One discovery into issues relevant to Plaintiffs' individual claims and the
16 requirements of class certification should begin upon entry of the Court's scheduling order,
17 followed by expert reports/declarations regarding class certification issues and discovery
18 regarding those expert reports/declarations.

19 **Plaintiffs anticipate** that their discovery requests will involve *in phase one*, (a)
20 document requests (which will *not* request searches of individual claims files and individual
21 claim electronic records), (b) limited interrogatories, (c) the request for an electronically
22 generated list of claims to be generated (but without identifying information being provided), (d)
23 a small random sample -of a size to be negotiated with Defendants - of information from claims

1 files of those on the list to be provided, (e) corporate designee depositions, and (f) limited
 2 depositions of individuals with information relevant to class certification. As further discussed
 3 with Defendant, (g) depending upon discussions with Defendant as to whether they will seek
 4 information and/or testimony from Audatex Plaintiffs may seek discovery from Audatex, (h)
 5 may seek discovery of individuals associated with Plaintiffs' individual claim depending upon
 6 the arguments that State Farm may make, and (i) discovery of any declarants or experts used by
 7 State Farm as to Class Certification or other issues.
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10 Plaintiffs propose that Class certification-related disclosures, motions practice, and
 11 discovery should proceed under the following deadlines¹:

- 12 (1) Plaintiffs' expert disclosures/Rule 26 reports and/or declarations and motions relating
 13 to class certification shall be due October 23, 2020;
- 14 (2) Defendant's class certification opposition and any expert disclosures/Rule 26 reports
 15 and or declarations relating to any class certification opposition and related motions
 16 shall be due December 18, 2020;
- 17 (3) Plaintiffs' rebuttal expert disclosures/Rule 26 reports and or declarations relating to
 18 any class certification reply and/or opposition to any defense motions shall be due
 19 February 12, 2021;
- 20 (4) Reply on any Motion filed by Defendant shall be due February 26, 2021.
- 21 (5) Within twenty-one (21) days of a ruling on class certification, the parties shall present
 22 the Court with a proposed schedule to govern the remainder of the case through and
 23 including briefing on summary judgment and expert disclosures related to the merits
 24 of the parties claims and defenses.

25 Defendant's Position: Defendant opposes Plaintiffs' "two-phase" bifurcated discovery
 26 approach. In practice, bifurcating discovery between what Plaintiffs call "Phase 1"—i.e., their
 27 "individual claims and whether the requirements for class certification have been met"—and

28 ¹ Plaintiffs note that ongoing disruption related to coronavirus may necessitate an extension of this schedule. The dates included herein are predicated upon there not being substantial disruption in work and travel.

“Phase 2”—i.e., “full discovery relevant to the merits of the class claims”—is impractical. This is so because the class certification inquiry requires the Court to engage in a “rigorous analysis” regarding whether Plaintiffs can meet Rule 23’s elements, and that “rigorous analysis” will necessarily “entail some overlap with the merits of the plaintiff’s underlying claim.” *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). Thus, any attempt to bifurcate discovery between “class issues” and “merits issues” simply introduces an arbitrary—and legally unsupportable—distinction in the discovery process that will lead to discovery disputes, create inefficiencies, and protract the litigation. Accordingly, Defendant proposes a single fact discovery period during which the Parties will develop their “class” and “merits” cases.

Defendant anticipates that, if discovery becomes necessary, it will serve written discovery on Plaintiffs, including document requests; depose Plaintiffs; seek third-party discovery relevant to Plaintiffs’ claims, including potentially from Audatex and the appraiser appointed by Ms. Ngethpharat; and engage in expert discovery. In accordance with Defendant’s Motion to Dismiss and, In the Alternative, Compel Appraisal and Stay, Defendant’s position is that, if Plaintiffs’ claims survive dismissal and the Court compels appraisal, this litigation—including discovery—should be stayed while the appraisal process is pending.

To the extent the Court disagrees, Defendant proposes the following schedule:

Initial Disclosures	June 29, 2020
Fact Discovery Opens	June 29, 2020
Fact Discovery Closes	February 5, 2021
Plaintiffs’ Rule 26 expert reports on the issue of class certification due	March 5, 2021
Deadline for Defendant to depose Plaintiffs’ experts	April 2, 2021

Defendants' Rule 26 expert reports on the issue of class certification due	April 30, 2021
Deadline for Plaintiffs' to depose Defendant's experts	May 28, 2021
<p>The following motions are due <u>no later than</u>:</p> <ul style="list-style-type: none"> Plaintiffs' motion for class certification; Motions to strike expert testimony under <i>Daubert</i>; and Motions related to class certification issues and/or motions for summary judgment relating to individual claims or issues. 	June 25, 2021
<p>Unless sooner due under applicable rule, the following responses are due <u>no later than</u>:</p> <ul style="list-style-type: none"> Defendant's opposition to Plaintiffs' motion for class certification; Responses to motions to strike expert testimony under <i>Daubert</i>; and Responses to motions for summary judgment relating to individual claims or issues. 	August 20, 2021
<p>Unless sooner due under applicable rule, the following replies are due <u>no later than</u>:</p> <ul style="list-style-type: none"> Plaintiffs' reply in support of Plaintiffs' motion for class certification; Replies in support of motions to strike expert testimony under <i>Daubert</i>; and Replies in support of motions for summary judgment relating to individual claims or issues. 	September 17, 2021
Class certification hearing	TBD

(C) electronically stored information.

The parties do not anticipate any issues related to electronically stored information. The Parties will discuss further, including the standard order on ESI, should the need arise.

1 **(D) privilege issues.**

2 Plaintiffs believe the W.D. of Wa. model protective order is appropriate. Defendant
3 anticipates negotiating and submitting to the Court a Joint Stipulated Protective and Rule 502(d)
4 Order. They do not anticipate privilege issues arising at this point.
5

6 **(E) proposed limitations on discovery.**

7 Plaintiffs have proposed doing discovery in phases, see Section (B), above.
8

9 Defendant has proposed a fact discovery period, an expert discovery period, and a period
10 to brief class certification and *Daubert*.

11 **(F) the need for any discovery related orders.**

12 As noted, the parties have different views of a protective order, which will if not resolved
13 between the parties require court involvement.
14

15 **5. Other Topics.**

16 **(A) prompt case resolution.**

17 Plaintiffs is open to discussing Class wide resolution.

18 Defendant is not open to discussing a classwide resolution at this time, but is open to
19 discussing resolution of Plaintiffs' individual claims.
20

21 **(B) ADR.**

22 Plaintiffs are open to mediation regarding a class wide resolution, but such mediation
23 would be premature absent an interest by Defendant in class wide resolution.

24 Defendant is not open to mediation regarding a classwide resolution, and accordingly
25 thinks ADR is premature at this point.
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(C) related cases.

State Farm has identified *Jama v. State Farm Fire & Cas. Ins. Co.*, No. 2:20-cv-00652-RAJ, as a related case. Defendant has filed a Motion to Transfer to a Single Judge and Consolidate Cases in this case, and Defendant State Farm Fire and Casualty Company has filed a Motion to Transfer to a Single Judge and Consolidate Cases in *Jama*. Plaintiffs take no position on transferring *Jama* to this Court, and are willing to work cooperatively to the extent possible with the unrelated counsel and plaintiff in *Jama* to coordinated discovery, but Plaintiffs oppose consolidating this case with *Jama* for all purposes.

(D)-(J) discovery management.

Discussed in Section 4.

6. *The date by which discovery can be completed.*

Plaintiffs anticipate that phase one discovery would be completed by February 26, 2021 (the reply date re Class Certification). The parties will then provide an updated Rule 26(f) report as to how they anticipate proceeding in phase two, depending upon this Court's ruling as to Class Certification.

Defendant proposes a 7-month fact discovery period, which would close on February 5, 2021. Defendant's position is that engaging in fact discovery, expert discovery, and briefing class certification at the same time is unworkable and inefficient, and notes that Plaintiffs' proposal includes a 4-month overlap period during which Plaintiffs envision conducting fact discovery, briefing class certification, and engaging in expert discovery at the same time. Under Defendant's proposal, following the fact-discovery cut-off of February 5, 2021, the parties would then engage in expert discovery, and would then brief class certification and *Daubert* issues.

1 ***7. Whether the case should be bifurcated by trying the liability issues before***
2 ***the damages issues, or bifurcated in any other way.***

3 The parties believe that Class Certification must be addressed in the first instance, and
4 that it is premature to discuss trial related issues.

5 ***8. Whether the pretrial statements and pretrial order called for by Local Civil***
6 ***Rules 16(e), (h), (i), and (k), and 16.1 should be dispensed with in whole or in part***
7 ***for the sake of economy.***

8 The parties believe that Class Certification must be addressed in the first instance, and
9 that it is premature to discuss trial related issues.

10 ***9. Any other suggestions for shortening or simplifying the case.***

11 The parties believe that Class Certification must be addressed in the first instance, and
12 that it is premature to discuss trial related issues.

13 ***10. The date the case will be ready for trial.***

14 The parties believe that Class Certification must be addressed in the first instance, and
15 that it is premature to discuss trial related issues.

16 ***11. Whether the trial will be jury or non-jury.***

17 The parties have requested a jury trial.

18 ***12. The number of trial days required.***

19 The parties believe that Class Certification must be addressed in the first instance, and
20 that it is premature to discuss trial related issues.

21 ***13. The names, addresses, and telephone numbers of all trial counsel.***

22 The parties believe that Class Certification must be addressed in the first instance, and
23 that it is premature to discuss trial related issues.

1
2 **14. The dates on which trial counsel may have complications to be**
3 **considered in setting a trial date.**

4 The parties believe that Class Certification must be addressed in the first instance, and
5 that it is premature to discuss trial related issues.

6 RESPECTFULLY SUBMITTED this 22nd day of June, 2020.

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